IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 910 OF 1997

Salim A.Gesavat,
Indian Inhabitant, residing at
Maholia Timber, Sadar Bazar,
Mukrence, Dist.Nagar, Rajasthan
State, through its Constituted
Attorney Mr.Naheed residing at
Dadabhai Chawl, Vakola Bridge,
Santacruz (East), Mumbai 400 054. ... Appellant.

Versus.

Mrs.Shabana, Adult, Indian
Inhabitant, residing at Girnar,
Flat No.12, 1st floor, 63, A
Chapel Lane, Santacruz (West),
Mumbai 400 054. ... Respondent.

Shri A.Y.Sakhare, Senior Counsel with Shri Chirag J.Shah i/by Shri J.J.Shah for the Appellant.

Shri Shekhar Shetye with Ms.Naseem Patrawala i/by M/s.Ravin Mehta & Mithi & Co. for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 29th March 2007.

ORAL JUDGMENT.

1. I have heard the submissions of the learned Counsel appearing for the parties on the last date. The original Plaintiff has taken an exception to the Judgment and order dated 8th July 1997 passed by the learned Judge of the City Civil Court, Mumbai by which the plaint has been ordered to be returned to the Appellant/Plaintiff for presentation to the proper

Court. By the said order, the learned trial Judge held that the Appellant/Plaintiff has not valued the suit properly for the Court fee and jurisdiction and if the suit is properly valued, this Court will not have pecuniary jurisdiction to try the suit.

2. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The Appellant claims to be the owner of a flat which is more particularly described in paragraph 1 of the plaint. The Respondent is the sister-in-law of the Appellant. The Respondent had married to the Appellant's brother by the name Shamim. The Appellant has made averments in the plaint to show as to how he acquired title in respect of the suit flat. According to the case of the Appellant, since 1992-93 he along with his family members were residing at native place. The Appellant has stated that for attending to his business he used to very often come to the Bombay and stay in the suit flat. It is alleged that along with the Appellant his brother Shamim and other members of the family were staying in the suit flat and the said Shamim was residing in the suit flat gratuitously without claiming any right, title and interest in his capacity as a member of the family. It is stated that after his marriage, the said Shamim along with the

Respondent started residing in the suit flat with the permission of the Appellant. According to the case of the Appellant, the relationship between his brother Shamim and the Respondent became strained. This resulted in Talaq and the said Shamim divorced the Respondent. As the Respondent used to reside with Shamim, after her divorce with Shamim, she has no right to reside in the suit flat. The said Shamim started residing elsewhere. Thereafter the Respondent started occupying the suit flat along with her two children and parents. It is alleged that the Appellant was unable to use and/or occupy and/or enter the suit flat. It is alleged that neither the Respondent nor her parents had any right to occupy the suit flat. It is alleged in the plaint that the Respondent was trying to sell, alienate or encumber or part with the possession of the suit flat. Prayer (a) in the suit reads thus:

(a) That this Hon’ble Court be pleased to issue a mandatory order and direction upon the defendant and her family members and/or any person or persons claiming through, by or under her to remove themselves from the suit flat along with their belongings viz. flat No.12, Girnar, 1st floor, Chappal Lane, Santacruz (West), Bombay 400 054."

The suit was valued by the Appellant by invoking section 6(iv)(j) of the Bombay Court Fees Act, 1959 (hereinafter referred to as "the said Act of 1959).

3. In the written statement an issue was raised by the Respondent as regards improper valuation of the suit and consequently the pecuniary jurisdiction of the City Civil Court entertain the suit. The trial Court framed 9 issues out of which issue No.7 was as regards the proper valuation and pecuniary jurisdiction of the trial Court. The said issue was taken up for hearing as a preliminary issue. The learned trial Judge held that the suit could not have been valued in accordance with section 6(iv)(j) of the said Act and that the suit ought to have been valued according to the market value of the suit flat. The learned trial Judge held that in substance the prayer in suit was for a decree for possession.

4. The learned Senior Counsel appearing for the Appellant submitted that the Respondent started occupying the suit flat as a member of the family of the Appellant being the wife of the real brother the Appellant. He submitted that as the Respondent has no right or interest of whatsoever nature in respect of the suit flat, and as the brother was occupying the suit flat as a member of the family, it was not necessary for

the Appellant to file a suit for possession and the Appellant was entitled to an injunction restraining the Respondent from entering or remaining in the suit flat. He placed reliance on the judgment of the learned Single Judge of this Court in the case of Conrad Dias v/s. Joseph Dias (1996 (2) Mah.L.J. page 208). He submitted that the suit is for injunction and therefore, the valuation of the suit made at Rs.300/- was legal and proper. The learned Counsel for the Respondent supported the impugned order by pointing out various averments made in the plaint.

5. I have considered the submissions made by the learned Counsel appearing for the parties. In the case of Conrad Dias (supra), the learned Single Judge was dealing with a First Appeal arising out of a suit filed in the City Civil Court at Bombay. In the appeal before the learned Single Judge, the Respondent/Plaintiff was the father and the Appellant was the son. The case of the Respondent/Plaintiff was that he was the owner of the suit premises and the Appellant/Defendant had no right and interest in the suit premises and was staying therein gratuitously being the son of the Respondent. The suit for injunction was filed by the Respondent/ father in which he prayed for injunction restraining the Defendant from entering or remaining in the suit premises. The learned Single Judge came to the

conclusion that the son gets into a family by birth and resides with parents. The learned Single Judge held that the son does so not as a licensee or in any other legal capacity but only as a member of the family. The issue before the learned Single Judge was whether the suit will be governed by the provisions of section 41 of the Presidency Small Cause Courts Act, 1882. The learned Single Judge held that the son was residing with the father as a member of his family. He held that the son cannot claim any legal character much less the character as a licensee. The learned Single Judge rejected the objection that the father should have filed a suit for possession.

6. It must be stated that in the case before the learned Single Judge even on the date of filing of the suit, Defendant-son was residing in the suit property as a member of the family of the Plaintiff-father. In the present case the Appellant-Plaintiff’s brother granted divorce to the Respondent and after divorce the brother Shamim started residing at another place. In fact specific averments have been made in paragraph 13 of the plaint that the suit flat was unauthorisedly occupied by the Respondent and her two children. It is further alleged that the Respondent has brought in the suit flat her mother, brother, sister and other members of the family. There is a specific assertion that the

Respondent continues to occupy the suit flat who after her divorce ceased to be a member of the family. There are assertions in the plaint wherein the Plaintiff/Appellant has himself stated that he is unable to enter the suit flat and the same is occupied by the Respondent and her family members. Therefore, on the date of institution of the suit, it cannot be said that the Respondent was occupying the suit flat as a member of the family of the Appellant. On the date of the suit the Appellant was not residing in the suit flat. It is alleged in the plaint that initially the Appellant's brother was gratuitously residing in the suit flat. It is alleged that the Respondent has no right in respect of the suit flat. Therefore, the ratio of the decision of the learned Single Judge in the case of Conrad Dias (Supra) has no application to the facts of the present case.

7. The Appellant/Plaintiff has valued the suit by invoking provisions of section 6(iv)(j) of the said Act. Clause (j) reads thus:

> "(j) For other declarations.- In suits where declaration is sought, with or without injunction or other consequential reliefs and the subject matter is in dispute is not susceptible of monetary evaluation and which are not otherwise

provided for by this Act ad-valorem fee payable, as if the amount or value of the subject-matter was three hundred rupees."

On the face of the said section, the same will not apply to the present suit as the said clause is applicable to the suit where declaration is sought with or without injunction or other consequential reliefs and where the subject matter in dispute is not susceptible of the monetary evaluation. In the present suit, there is no prayer for declaration. Apart from this, it cannot be said that the subject matter of the suit, which is a flat, is not susceptible to the monetary evaluation.

8. There is some substance in the submission that prayer (a) is in fact a prayer for possession of the suit flat which even according to the Appellant was occupied by the Respondent and her family members on the date of institution of the suit. On the date of institution of the suit, the marked value of the suit flat was certainly more tan Rs.50,000/-.

9. Considering the aforesaid aspects, the learned trial Judge has rightly held that the suit has not been valued properly for the purpose of Court fee and jurisdiction. If the suit is properly valued for jurisdiction, the valuation will exceed Rs.50,000/-.

Therefore, the order of return of the plaint has been passed by the trial Court.

10. I find no error in the view taken by the learned trial Judge. There is no merit in the Appeal and the same is accordingly dismissed. No order as to costs.

Judge.